COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-843

A.F.

vs.

B.Z.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from the denial of his motion to terminate a permanent abuse prevention order that was entered pursuant to G. L. c. 209A, § 3. He contends that the judge erred in denying his motion because he met his burden of proof. Finding no error, we affirm.

We review the denial of such a motion for abuse of discretion. See MacDonald v. Caruso, 467 Mass. 382, 382-383 (2014). In order to prevail, the defendant was required to "show by clear and convincing evidence that, as a result of a significant change in circumstances, it is no longer equitable for the order to continue because the protected party no longer has a reasonable fear of imminent serious physical harm." Id. See Mitchell v. Mitchell, 62 Mass. App. Ct. 769, 781 (2005)

(abuse prevention order "should be set aside only in the most extraordinary circumstances").

Here, the judge heard testimony from the defendant and his wife, and accepted other documentary evidence including criminal background information, letters from psychotherapists and social workers, and character references. The judge also heard testimony from the plaintiff and reviewed police reports concerning the incident leading up to the issuance of the abuse prevention order, as well as an audio recording of the defendant's plea colloquy relating to the same incident. The judge made detailed findings, the substance of which the defendant does not contest.[1]

According to those findings, the defendant was physically abusive to the plaintiff during their marriage including incidents where he smashed her head against a wall and strangled her while she was pregnant. The plaintiff never reported the abuse because the defendant, who was a police officer, told her that he would lose his job if she did.[2] In 2012, there was an incident where the defendant went to the home of the plaintiff's friend at 2:00 A.M. and pounded on the door. The pounding was

[1] The defendant notes a few misidentified dates which do not impact the analysis.

[2] The plaintiff also was contacted by other law enforcement officers who suggested that she not report for the same reason.

of such force that the door could not be opened. The plaintiff's friend asked the defendant to meet him at the side door of the home. When the friend opened the door, the defendant immediately pepper-sprayed him and then punched him in the face. The defendant then ordered the plaintiff to get into his car. After she complied and was in the defendant's car, the defendant smashed her head against the passenger side window.

The plaintiff obtained an abuse prevention order against the defendant on January 13, 2012.[3] In February 2014, the defendant pleaded guilty to two counts of assault and battery and was sentenced to eighteen months in the house of correction, suspended for three years.[4] The order was made permanent in January 2015 (permanent order); the defendant did not appear at that hearing to object to an extension, nor did he appeal the issuance of the permanent order. In February 2017, the defendant completed his probation without incurring any additional criminal charges. He successfully completed programs

[3] The police removed a large number of firearms and ammunition from a safe in the defendant's home. According to the plaintiff, the defendant also kept a knife "to keep her in line," and had installed cameras within their home without her knowledge.

[4] At the time of the disposition of the criminal case, the plaintiff's primary objective was to obtain a permanent abuse prevention order. At the hearing, five years after the order initially issued, the plaintiff testified that it remained a primary concern for her and that she still carried a copy of the order with her due to her ongoing fear of the defendant.

and engaged in counselling as well. The defendant remarried and moved to Tennessee. In May 2017, the defendant moved to terminate the permanent order, citing limitations in his ability to attend family events (with two adult children in common with the plaintiff) and obtain desired employment.

The defendant contends that the judge "flouted the SJC's precedent" by not finding a significant change in circumstances due to his remarriage and move out of State -- two changes in circumstances "nearly identical" to those cited by the defendant in MacDonald. See MacDonald, 467 Mass. at 391. In MacDonald, the court held that these two particular factors "may support" such a finding, noting that a move out of State may indicate increased cost and expense which could deter the defendant from seeking out the plaintiff, and remarriage may indicate that the defendant is no longer emotionally connected to the plaintiff. Id. at 391. Here, however, the defendant's move out of State would not deter him from returning to Massachusetts since he had at least one adult child still residing within the Commonwealth. Indeed, he indicated that one of his goals in filing the motion was to be able to participate more fully in his children's lives. Additionally, the defendant had been remarried for less than two years at the time of the hearing, making it less than clear that he was no longer emotionally connected to the plaintiff. As the judge also noted, this was not a case where

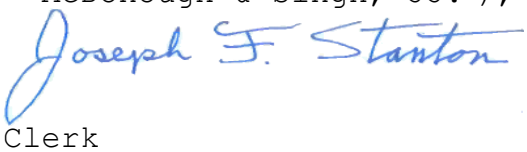
the parties were not likely to cross paths again. See Iamele v. Asselin, 444 Mass. 734, 740 (2005) (in evaluating risk of future abuse, judge should consider "the likelihood that parties will encounter one another in the course of their usual activities"). Therefore, these factors, in the circumstances of this case, did not constitute a significant change in circumstances.

The defendant also contends that the judge erred in finding that the plaintiff could still have a reasonable fear of imminent serious physical harm, given the substantial evidence he proffered. While the defendant may well have presented a "stronger evidentiary foundation" for his motion than that presented in MacDonald, it was still within the judge's province to evaluate it. MacDonald, 467 Mass. at 394. Here, the judge noted that the defendant brought his motion only months after completing his probation. She questioned the basis on which individuals wrote in support of the defendant. Ultimately, the judge determined that, "in view of the length and severity of the abuse alleged," the defendant's proffer failed to establish by clear and convincing evidence that the plaintiff could no longer have any reasonable fear of imminent serious physical harm. See id. at 391 (court should consider totality of

circumstances in determining reasonable fear of imminent serious physical harm). We discern no abuse of discretion.[5]

Order denying motion to vacate permanent abuse prevention order dated January 9, 2015, affirmed.

By the Court (Kinder, McDonough & Singh, JJ.[6]),



Clerk

Entered: July 22, 2019.

[5] The defendant also argues that the judge erred in applying a standard derived from Callahan v. Callahan, 85 Mass. App. Ct. 369 (2014), essentially because the case was wrongly decided. The judge did not cite Callahan in her decision and we have no cause to revisit the case. The judge here stated and applied the correct standard in determining whether to terminate a permanent restraining order. See MacDonald, 467 Mass. at 389.

[6] The panelists are listed in order of seniority.